17.245 The Supreme Court, Civil Liberties, and Civil Rights
Fall 2006

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Discussion 14: Gender Discrimination

There are three general levels of equal protection analysis reflected in Supreme Court case law:

- Strict Scrutiny: used by the Supreme Court in cases of race-based, religious-based and other "suspect" classifications of groups. In these situations the court will closely scrutinize the state interest in the classification. In order to survive strict scrutiny, the state must prove that its interest is compelling and that its classification is as narrowly tailored to advancing that interest as possible. Essentially, the court asks two questions:
    - Is the interest compelling?
    - Is the classification narrowly tailored to meet that interest?

- Rational Basis: In this deferential form of review, the government must only provide a rational reason for a classification. The rational basis put forth by the state in defending its law does not need to be the same as the reason for the statute as enacted; instead, there need only be a rational basis at the time the case is reviewed. Therefore, the original reason or purpose for the law and the rational basis under which it is defended do not need to be the same.

- Intermediate Scrutiny: This standard of review applies primarily to gender classifications. The Court will strike down such classifications under the Equal Protection Clause unless the state can prove an "exceedingly persuasive" justification (Mississippi University for Women v. Hogan, VMI).

Craig v. Boren, 1976:

Craig, a liquor store owner, challenged an Oklahoma statute prohibiting the sale of non-intoxicating 3.2% beer to males aged 18-20. As applied, the law allowed females over 18 and males over 21 to purchase the alcohol. The law is challenged on 14th Amendment equal protection grounds.

Argument Synopsis:
The Supreme Court applies an elevated level of scrutiny (known as "intermediate scrutiny") to gender-based classifications. As argued in Craig, this level of scrutiny leaves intact classifications dealing with certain differences between males and females (e.g. having separate public bathrooms). Strict scrutiny, in some circumstances, may not allow such classifications for pragmatic but not compelling reasons. The Court recognizes this standard in Section II.A of the majority opinion:

"Analysis may appropriately begin with the reminder that Reed emphasized that statutory classifications that distinguish between males and females are "subject to scrutiny under the Equal Protection Clause." 404 U.S., at 75 . To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives" (Brennan, Craig v. Boren).

In this decision, the Court looks at the statistics to determine if the state has a reasonable claim to justify the classification:

- 2% of males have driven while intoxicated
- .18% of females have driven while intoxicated

The majority and dissenting opinions all recognize that of those caught driving drunk in this 18-20 age group, the large majority are men, but the opinions differ in their view of the importance of these statistics.

- The majority says that this is such a small percentage that it cannot justify a gender-based classification:

"The most focused and relevant of the statistical surveys, arrests of 18-20-year-olds for alcohol-related driving offenses, exemplifies the ultimate unpersuasiveness of this evidentiary record. Viewed in terms of the correlation between sex and the actual activity that Oklahoma seeks to regulate - driving while under the influence of alcohol - the statistics broadly establish that .18% of females and 2% of males in that age group were arrested for that offense. While such a disparity is not trivial in a statistical sense, it hardly can form the basis for employment of a gender line as a classifying device." (Brennan, Craig v. Boren)

- Rehnquist believes that because of the evidence that many more males drive while intoxicated than females, the law advances a legitimate interest of the state:

"The rationality of a statutory classification for equal protection purposes does not depend upon the statistical "fit" between the class and the trait sought to be singled out. It turns on whether there may be a sufficiently higher incidence [429 U.S. 190, 226] of the trait within the included class than in the excluded class to justify different treatment. Therefore the present equal protection challenge to this gender-based discrimination poses only the question whether the incidence of drunk driving among young men is sufficiently greater than among young women to justify differential treatment. Notwithstanding the Court's critique of the statistical evidence, that evidence suggests clear differences between the drinking and driving habits of young men and women. Those differences are grounds enough for the State reasonably to conclude that young males pose by far the greater drunk-driving hazard, both in terms of sheer numbers and in terms of hazard on a per-driver basis. The gender-based difference in treatment in this case is therefore not irrational" (Rehnquist, dissent in Craig v. Boren).

Additionally, Rehnquist's dissent claims that there should not be any heightened level of scrutiny for gender-based classifications, and therefore uses a standard similar to rational basis review. "There is, in sum, nothing about the statutory classification involved here to suggest that it affects an interest, or works against a group, which can claim under the Equal Protection Clause that it is entitled to special judicial protection" (Rehnquist, Craig v. Boren).

Which reading of statistics is better?

Rehnquist is correct that those who are driving drunk are more likely to be men. The majority says that the means used by a state to achieve its interest has to be substantially related to the interest at hand, and that "the relationship between gender and traffic safety becomes far too tenuous to satisfy Reed's requirement that the gender-based difference be substantially related to achievement of the statutory objective" (Brennan, Craig v. Boren).

In this case, the plaintiff is saying that any kind of classification distinguishing between males and females, regardless of history, is inconsistent with the equal protection clause. Does there have to be a history of discrimination to raise a constitutional question under equal protection?

The majority view is that any gender classification is subject to heightened scrutiny, while Rehnquist takes a more narrow interpretation.

From another perspective, the law may be viewed as paternalistic and discriminatory because it reinforces gender stereotypes. Query whether this dynamic can be separated from the asserted state interest, which is to prevent drunk driving by targeting male drivers specifically.

Ultimately, the court concludes the statute invidiously discriminates against males aged 18-20 and strikes the law down as an illegitimate exercise of state power.

Discussion of United States v. Virginia, 1996:

Background:
The United States sues the Virginia Military Institute (VMI), a public university with a long tradition of educating male citizen-soldiers using the adversative message, for violation of federal anti-discrimination law and the equal protection clause of the 14th Amendment.

Argument Synopsis (majority opinion):

- The method used by VMI to educate is not inherently unsuitable for women;
- Women are denied the opportunity to obtain an education with the same benefits as VMI;
- There are at least some women who could meet VMI's admissions standards;
- Establishment of a parallel institute for women could not afford the same benefits to women as admitting them to VMI; and therefore,
- By excluding women, VMI is denying women the equal protection afforded to them by the 14th Amendment
- Admitting women would not destroy the adversative method or the tradition of excellence at VMI

The standard of review used by the court is explained in Justice Ginsburg's majority opinion:

"Without equating gender classifications, for all purposes, to classifications based on race or national origin, 6 the Court, in post-Reed decisions, has carefully inspected official action that closes a door or denies opportunity to women (or to men). See J. E. B., 511 U.S., at 152 (Kennedy, J., concurring in judgment) (case law evolving since 1971 "reveal[s] a strong presumption that gender classifications are invalid"). To summarize the Court's current directions for cases of official classification based on gender: Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. See Mississippi Univ. for Women, 458 U.S., at 724 . The State must show "at least that the [challenged] classification serves `important governmental objectives and that the discriminatory means employed' are `substantially related to the achievement of those objectives.'" Ibid. (quoting Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150 (1980)). The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not

rely on overbroad generalizations about the different talents, capacities, or preferences of males and females. See Weinberger v. Wiesenfeld, 420 U.S. 636, 643 , 648 (1975); Califano v. Goldfarb, 430 U.S. 199, 223 -224 (1977) (Stevens, J., concurring in judgment). The heightened review standard our precedent establishes does not make sex a proscribed classification. Supposed "inherent differences" are no longer accepted as a ground for race or national origin classifications. See Loving v. Virginia, 388 U.S. 1 (1967). Physical differences between men and women, however, are enduring: "[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both." Ballard v. United States, 329 U.S. 187, 193 (1946)" (Ginsburg, US v. Virginia)

Having reviewed and developed the rationale for this standard of review, Ginsburg eventually concludes that the only possible remedy for the equal protection violation would be to admit women to VMI. The Court finds that single-sex education is not intrinsic to the methods used by VMI. It further observes that VMI's educational tradition would not be destroyed by moving to co-education.

The lone dissent in the case, by Justice Scalia, argues that the Court applies a scrutiny test inconsistent with past notions of intermediate scrutiny:

"Similarly, the Court states that "[t]he State's justification for excluding all women from `citizen-soldier' training for which some are qualified . . . cannot rank as `exceedingly persuasive'. . . ." Ante, at 28. 23

Only the amorphous "exceedingly persuasive justification" phrase, and not the standard elaboration of intermediate scrutiny, can be made to yield this conclusion that VMI's single-sex composition is unconstitutional because there exist several women (or, one would have to conclude under the Court's reasoning, a single woman) willing and able to undertake VMI's program. Intermediate scrutiny has never required a least-restrictive-means analysis, but only a "substantial relation" between the classification and the state interests that it serves…The reasoning in our other intermediate-scrutiny cases has similarly required only a substantial relation between end and means, not a perfect fit... classification need not be accurate "in every case" to survive intermediate scrutiny so long as, "in the aggregate," it advances the underlying objective. There is simply no support in our cases for the notion that a sex-based classification is invalid unless it relates to characteristics that hold true in every instance" (Scalia, US v. Virginia)